

REMARKS

In view of the remarks put forth below, the Examiner is requested to withdraw the rejections and allow Claims 1, 3-5, 7, 8, 10, 11, 13, 14, 16-20, 41, 42, 44, 54 and 57-60, as well as new Claims 61-64, the only claims pending and under examination in this application.

Claims 1, 11, 14, 41, 42, 44, 54 and 57-60 are amended herein. Claims 2, 6, 9, 12, 15, 21-29, 32-40, 43, 45-53 and 55-56 are cancelled. Claim 59 was withdrawn by the Examiner as being directed to non-elected complexing agents.

Claim 1 is amended to recite "a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide," support for which is found throughout the specification, for example, at paragraphs 2-6, 22, 93 and 94 where the phytotoxic effects and amounts of pesticides of the claimed invention are described, as evidenced by the demonstration of induction of phytotoxicity in the control samples of the experimental section.

Claims 42, 57 and 59 are amended to further specify the components of the pesticide-induced phytotoxicity reducing component. Support for these amendments is found throughout the specification, for example, at paragraph 50, lines 8-9, paragraph 20, lines 11-14, and paragraphs 55 and 59.

Claims 45, 58 and 60 are amended to further specify the % amounts of the components present in an aqueous pesticide composition. Support for these amendments is found throughout the specification, for example, at paragraphs 22, 26, 27, 34, 42, 51 and 65.

New Claims 61-64 are dependent on Claim 58 and further specify the pesticides. Support for these new claims is found throughout the specification, for example, at paragraphs 70-73.

No new matter is introduced by the above amendments. Entry of the above amendments is respectfully requested.

Claim Rejection under 35 U.S.C. § 112, second paragraph

The Examiner rejected Claims 41-44, 46-56, 58 and 60 under 35 U.S.C. §112, second paragraph. Without any intention to acquiesce to the correctness of this rejection and solely to expedite prosecution, the Applicant has amended Claims 41, 42, 44, 54, 58 and 60, and cancelled Claims 43, 46-53, and 55-56. The Applicant believes that the amendments may

address some of the issues that underpin these rejections under U.S.C. § 112, second paragraph. To the extent that this rejection is not addressed by the amendments, these rejections are traversed below.

The Examiner rejected Claims 41 and 54 because use of the term comprising “opens [the claim] to include anything else.” See Office Action, page 2. However, Claims 41 and 54 clearly recite a pesticide composition consisting of a phytotoxicity-inducing synthetic pesticide and a pesticide-induced phytotoxicity reducing component, as such the metes and bounds of the claimed composition are clearly defined. However, the pesticide-induced phytotoxicity reducing component itself need not be limited to include only the components (i) to (v) recited in the claims. Other phytotoxicity reducing components could also be added to the composition. Thus, the Applicant submits that one of ordinary skill in the art would understand what is claimed¹ and as such Claims 41 and 54 are not indefinite under 35 U.S.C. §112, second paragraph.

In addition, as amended Claims 45, 58 and 60 are amended to further specify % amounts of the components in the pesticide composition. In the Office Action (see page 5), the Examiner noted that any specified % amounts of the components should account for 100% of the composition. The Applicant submits that the components may be present as a % w/w in any convenient matrix that need not be specified. However, solely to expedite prosecution, as amended Claims 45, 58 and 60 are directed to aqueous pesticide compositions.

In view of the above, the Examiner is respectfully requested to withdrawn the rejection of Claims 41, 42, 44, 54 and 58 and 60 under 35 U.S.C. §112, second paragraph.

Claim Rejection under 35 U.S.C. § 103, Harmon and Kloppling in view of Beaty as explained by Bath

Claims 1, 3-5, 7, 8, 10, 11, 13, 14, 16-20, 41-44, 46-57 are rejected under 35 U.S.C. § 103 (a) as allegedly being unpatentable over Harmon (U.S. Patent No. 3,558,787) and Kloppling

¹ The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576; 1 U.S.P.Q.2d 1081, 1088 (Fed. Cir. 1986).

(U.S. Patent No. 3,789,122) in view of Beaty (U.S. Patent No. 5,634,959), as explained by evidence of Bath (U.S. Patent No. 6,083,293). Without any intention to acquiesce to the correctness of this rejection and solely to expedite prosecution, Claims 1, 11, 14, 41, 42, 44, 54 and 57 have been amended, and Claims 43, 54, 46-53, 55 and 56 are cancelled. To the extent that this rejection applies to amended claims and new Claims 61-64, it is respectfully traversed.

For the reasons detailed below, the rejected claims are not rendered obvious by the cited combination of references because: 1) the cited references do not teach or suggest the claimed element of amounts of components sufficient to reduce pesticide-induced phytotoxicity of a plant; 2) the showing of unexpected results in the Applicant's Experimental Section is sufficient to overcome a *prima facie* case of obviousness; and 3) the Examiner has not established a *prima facie* case because the Examiner has used an impermissible 'obvious to try' standard in attempting to argue the obviousness of the claimed invention.

1. Not all elements are taught or suggested

As amended, Claim 1 recites:

- A pesticide composition for applying to a plant, the composition comprising:
- (a) a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide;
 - and
 - (b) a pesticide-induced phytotoxicity reducing component comprising:
 - (i) an assimilable carbon-skeleton energy component;
 - (ii) a water soluble macronutrient component;
 - (iii) a water soluble micronutrient component; and
 - (iv) a vitamin/cofactor component;
- wherein components (i), (ii), (iii) and (iv) are present in amounts sufficient to reduce pesticide-induced phytotoxicity of the plant.

As such, elements of claimed composition are: 1) a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide; and 2) amounts of components (i)-(iv) sufficient to reduce pesticide-induced toxicity of the plant.

In order to meet its burden in establishing a rejection under 35 U.S.C. §103, the Office must first demonstrate that a prior art reference, or references when combined, teach or suggest all claim elements. See, e.g., *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007); *Pharmastem Therapeutics v. Viacell et al.*, 491 F.3d 1342, 1360 (Fed. Cir. 2007); MPEP § 2143(A)(1).

In maintaining this rejection, the Examiner cites Harmon and Klopping for providing compositions containing pesticides and fertilizers. For specific fertilizer components, the Examiner cites Beaty for disclosing fertilizers and nutrients that are useful to apply to plants; as explained by Bath which discloses the further components of a fertilizer.

Further, the Examiner appears to base this rejection on the assertion that the “Applicant is arguing for the functions and intended use of the claimed composition.” See Office Action, page 4, paragraph 2. As such, the Examiner appears to give no weight to the above claim elements. The Applicant respectfully disagrees.

The Applicant respectfully submits that the above claim elements do limit the components of the pesticide composition recited in the claims because not all pesticides and fertilizer components can be encompassed by the claims. Specifically, not all pesticides, or amounts thereof would induce phytotoxicity in a plant. Further, not all fertilizer components, or combinations thereof, would necessarily reduce the pesticide-induced toxicity of the plant. Further, merely because a fertilizer may have a known beneficial effect on a healthy plant, it would not necessarily mean that the fertilizer, or components thereof, would protect against adverse phytotoxic effects that pesticides have on the physiological functions of a plant. The action of a fertilizer on a healthy plant could be completely unrelated to actions which protect against the phytotoxic effects of a pesticide on the plant (see further discussion below).

When the claim element in question is given full patentable weight, the Examiner must demonstrate that the cited references teach or suggest a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide, and amounts of components (i)-(iv) sufficient to reduce pesticide-induced toxicity of the plant. However, as discussed below, the cited references fail to teach or suggest the claim elements.

Harmon and Klopping are both completely silent as to pesticide-induced phytotoxicity. The Examiner has pointed to no teachings of the cited references that describe whether or not a pesticide is phytotoxicity inducing, much less a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide. As such, Harmon and Klopping fail to teach or suggest a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide because Harmon and Klopping provide no guidance to select a pesticide as a phytotoxicity-inducing pesticide,

much less amounts of such pesticides that would induce phytotoxicity. Beaty and Bath fail to remedy the deficiencies of Harmon and Klopping because Beaty and Bath are cited solely for fertilizer components.

In addition, Harmon and Klopping both only make general mention of fertilizers, and fail to provide any specific teachings, instruction or guidance with respect to the selection of fertilizer components from a list of ingredients, and their use in pesticidal compositions.

Harmon only makes general mention that “[c]ompositions of this invention can additionally contain known insecticides, fungicides, acaricides, nematocides, fertilizers and nutrients such as the following:” (column 4, lines 50-53). In fact, the long list of subsequent examples that Harmon gives in support of this statement (column 4, line 54 to column 6, line 32) contains no specific examples of fertilizers, or components thereof. Harmon is completely silent as to pesticide-induced phytotoxicity, let alone the identity and amounts of fertilizer components sufficient to reduce such phytotoxicity.

Similarly, Klopping makes only general mention that “compositions can contain, in addition to the active ingredient of this invention, conventional insecticides, miticides, bactericides, nematocides, fungicides, or other agricultural chemicals such as fruit-set agents, fruit-thinning compounds, fertilizer ingredients and the like” (column 29, lines 41-45). Similarly, the long list of examples that Klopping gives in support of this statement (column 29, line 54 to column 31, line 41) contains no specific examples of fertilizers, or components thereof. Klopping is also completely silent as to pesticide-induced phytotoxicity, let alone the identity and amounts of fertilizer components sufficient to reduce such phytotoxicity.

As such, the combined teachings of Harmon and Klopping do not teach or suggest the claimed element of amounts of components (i)-(iv) sufficient to reduce pesticide-induced toxicity of the plant, because the cited references provide no teachings of pesticide-induced phytotoxicity, no guidance to make particular selections of specific components from the list, let alone an understanding of which components or amounts thereof would be useful to reduce such phytotoxicity.

In fact, before the Applicant’s work in the field, amounts of components (i)-(iv) sufficient

to reduce pesticide-induced phytotoxicity were not known. In the Experimental section, the Applicant demonstrates that after the application of pesticide compositions including components (i) to (iv), a reduction in pesticide-induced phytotoxicity of 78-100% is observed (Expt. IIA-IID, pages 35-41). The Examiner has pointed to no teachings of the cited references which teach or suggest the above claimed element.

Beaty and Bath are cited solely for their teachings of fertilizers and a breakdown of the components of a seaweed extract. Beaty is directed towards a fertilizer mixture of largely natural ingredients including seaweed extract and fish solubles. Bath provides a breakdown of the components of a seaweed extract that includes over 70 individual components (column 6, table). Beaty and Bath are both completely silent with respect to pesticides and phytotoxicity-reducing pesticidal compositions, let alone amounts of specific components (i)-(iv) required to reduce such phytotoxicity, as required by the present claims.

As such, Beaty and Bath do not remedy the deficiencies of Harmon and Klopping. Thus, the combined teachings of the cited references do not teach or suggest a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide, or amounts of components (i)-(iv) sufficient to reduce pesticide-induced toxicity of the plant, as claimed.

As such, the cited references do not teach or suggest each and every element of the claims, and cannot render the cited claims obvious under 35 U.S.C. § 103(a). Accordingly, the Examiner is respectfully requested to withdrawn this rejection, for this reason alone.

2. Evidence of unexpected results is sufficient to overcome any *prima facie* case of obviousness

Furthermore, the Applicant's showing of unexpected results in the Experimental section is sufficient to overcome any alleged *prima facie* case of obviousness.

In maintaining this rejection over the Applicant's prior arguments that the Experimental section provides objective evidence of unexpected results, the Examiner appears to assert that the results are merely well known art recognized effects and not surprising, because any one in the horticulture or agronomic arts utilizing pesticides uses fertilizers to enhance overall vigor and appearance. Applicant submits that the Examiner has provided insufficient evidence and

reasoning to support these assertions regarding the Applicant's objective evidence, as will be discussed below.

As set forth by the Supreme Court in *KSR*, "a court *must* ask whether the improvement is more than the predictable use of prior art elements according to their established functions." *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007); emphasis added. As such, in addition to showing that all elements of a claim were known in the prior art and that one of ordinary skill in the art had a reason to combine them, the Office must also **provide evidence** that the combination would be a predicted success. Furthermore, as set forth in MPEP § 2145, office personnel should not evaluate rebuttal evidence for its "knockdown" value against the *prima facie* case, *Piasecki*, 745 F.2d at 1473, 223 USPQ at 788, or summarily dismiss it as not compelling or insufficient. If the evidence is deemed insufficient to rebut the *prima facie* case of obviousness, Office personnel should specifically **set forth the facts and reasoning** that justify this conclusion.

The Examiner has not provided any evidence to support his above assertions regarding the Applicant's results that show a reduction in pesticide-induced phytotoxicity in a plant.

Pesticide-induced phytotoxicity is an adverse effect that a pesticide has on the physiological functions of a plant. Phytotoxic effects may include a weakening of the plants' natural resistance to physical and biological stresses, pests, and/or pathogens which lead to plant damage. See the specification at pages 1-2, paragraphs 2-4. Phytotoxicity reducing activity is defined in the specification as subtle to significant increases in a plant's protection from pesticide-induced phytotoxicity (page 6, paragraph 18).

The damage caused by the phytotoxic action of a pesticide on a plant, and the protection against such damage afforded by various compositions, was shown in the Applicant's Experimental Section via observation of changes in the overall vigor and appearance of the plants.

The Examiner asserts that the reduction in pesticide induced phytotoxicity is merely "seen as utilizing art known practices and ingredients" of fertilizers on plants. See Office Action, page 4, paragraph 4. However, the Examiner has provided no evidence to support this

assertion. The Examiner reasons that one of ordinary skill in the art would use the claimed composition to protect against pesticide-induced phytotoxicity, because of known effects of fertilizers on healthy plants. However, the Examiner provided no evidence of any relevant properties of fertilizers. Further, even if the Examiner provided evidence that a fertilizer would have a beneficial effect on a healthy plant, it would not necessarily mean that the fertilizer would protect against adverse phytotoxic effects that pesticides have on the physiological functions of a plant. The action of a fertilizer on a healthy plant could be completely unrelated to actions which protect against the phytotoxic effects of a pesticide on the plant.

Nowhere does the Examiner provide any facts or reasoning that links the activity of a fertilizer on a healthy plant to a reduction in pesticide induced phytotoxicity in the plant.

On the contrary, before the present invention, one of ordinary skill in the art would not know whether or not the activity of a fertilizer on a plant could reduce the phytotoxic effects of a pesticide on the plant. The damage caused by pesticide induced phytotoxicity could have overwhelmed any positive effects of the fertilizer on the plant.

Alternatively, the physiological functions damaged by the pesticide could be very different from those functions affected by the fertilizer, such that the fertilizer would have no effect on pesticide-induced phytotoxicity. Further, the effects of a fertilizer could have even enhanced the phytotoxic action of the pesticide, and lead to further adverse effects.

As such, before the present invention, one of ordinary skill in the art would not know what effects, if any, the fertilizer might have on pesticide-induced phytotoxicity. The Examiner has provided no evidence to support his assertion that the activity of a fertilizer on a plant would lead to a reduction in pesticide-induced phytotoxicity.

In sum, the Examiner's opining as to what one of ordinary skill in the art would consider a "art known practices and ingredients" of fertilizers, is insufficient to rebut Applicant's objective evidence of a reduction in pesticide-induced phytotoxicity, because the Examiner has provided no evidence linking the activity of fertilizer on healthy plants to a protective effect against pesticide-induced phytotoxicity.

Thus, the Examiner's conclusion that the Applicant's showing of a reduction in pesticide-induced phytotoxicity in a plant does not meet the standard of unexpected results is merely conclusory and insufficient to sustain this rejection, as per MPEP § 2142.²

In addition, it appears the Examiner is maintaining this rejection in part on faulty reasoning that equates the action of fertilizer on healthy plants with the phytotoxicity-reducing activity of the presently claimed composition.

However, phytotoxicity reducing activity, as clearly defined in the specification, means "subtle to significant increases in a plant's protection from pesticide-induced phytotoxicity, relative to the administration of pesticide alone" (page 6, paragraph 18). The measurements of overall vigor and appearance are made in the unique context of a plant experiencing pesticide-induced phytotoxicity. Thus, the effect being observed in the Applicant's Experimental Section is a different effect from that which may be observed in the overall vigor and appearance of healthy plants treated with fertilizer.

Applicant maintains that the claimed compositions are more than the predictable use of prior art elements according to their established functions. The phytotoxicity of four pesticides was demonstrated by measuring adverse effects on the overall vigor and appearance of plants. These adverse phytotoxic effects were reduced by 78% to 100% in Experiments IIA-IID when compositions of the invention were applied to the plants. As such, this demonstrated reduction in pesticide-induced phytotoxicity is a protective action of the claimed composition, and is not necessarily an expected result of a growth enhancing action of a fertilizer on a healthy plant.

In fact, the cited references are completely silent regarding phytotoxic effects of pesticides, and provide no guidance or understanding of how to reduce such pesticide-induced phytotoxicity. The Examiner has provided no evidence that the growth enhancing action of a fertilizer on a healthy plant is the same as the reduction in pesticide-induced phytotoxicity demonstrated in the Applicant's Experimental Section.

² The Federal Circuit has stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR*, 127 S. Ct. at 1740-1741, quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

In summary, the Applicant contends that sufficient objective evidence has been presented commensurate in scope with present claims, which demonstrates that the claimed compositions are more than merely the predictable use of prior art elements according to their established functions. The Examiner has not provided any evidence to support his assertions regarding the Applicant's objective evidence. Further, the Examiner's reasoning is faulty because it equates the action of fertilizer on healthy plants with the phytotoxicity reducing activity of the claimed composition.

As such, the Examiner's unsupported assertions and faulty reasoning are insufficient to rebut the Applicant's objective evidence of unexpected results. Accordingly, the claimed compositions are not obvious over the references cited by the Examiner, and Applicant respectfully requests that this rejection be withdrawn, for this reason alone.

3. Impermissible 'obvious to try' standard used in attempting to establish *prima facie* case of obviousness

Furthermore, the Applicant contends that a *prima facie* case of obviousness has not been established because it would not be obvious to one of ordinary skill in the art to select the combination of specifically claimed components in amounts sufficient to reduce pesticide induced phytotoxicity from the wide range of possibilities.

In *KSR*, the Supreme Court made clear that, "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. . . . it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR*, 127 S. Ct. at 1741. An invention is not obvious under 35 U.S.C. § 103, "where the prior art [gives] either no indication of which parameters [are] critical or no direction as to which of many possible choices is likely to be successful." *Merck & Co., Inc. v. Biocraft Labs., Inc.*, 10 USPQ2D (BNA) 1843 (Fed. Cir. 1989), quoting *In re O'Farrell*, 7 USPQ2D (BNA) 1673 (Fed. Cir. 1988)."

In maintaining this rejection, the Examiner relies on Harmon and Klopping for providing compositions containing pesticides and fertilizers. For specific fertilizer components, the

Examiner cites Beaty for disclosing fertilizers and nutrients that are useful to apply to plants; as explained by Bath which discloses the further components of a fertilizer.

Harmon and Klopping are silent with respect to phytotoxicity, and phytotoxicity inducing pesticides. Klopping (columns 29-31) and Harmon (columns 4-6) teach long lists of pesticides, but provide no guidance to select any “phytotoxicity-inducing synthetic pesticide” out of the wide range of possibilities. Further, Harmon and Klopping both make only general mention of fertilizers (col. 4, line 52 and col. 29, line 45, respectively). As such, Harmon’s and Klopping’s general mention of fertilizers provides no specific instruction or guidance to make particular selections of types of fertilizers, or fertilizer components, or amounts thereof, for phytotoxicity-reducing pesticide compositions from a wide range of possibilities, and no understanding of which fertilizers, fertilizer components, or amounts thereof that would be sufficient to reduce pesticide-induced toxicity.

Further, Beaty and Bath are cited solely for their teachings of fertilizers, and for a breakdown of the components of a seaweed extract. Beaty and Bath are silent with respect to pesticides and phytotoxicity-reducing pesticidal compositions. Beaty is directed towards fertilizer mixtures including seaweed extracts and fish solubles. Bath provides a breakdown of the components of a seaweed extract that includes over 70 individual components (column 6, table). Although Beaty and Bath provide a long list of ingredients for fertilizers, they provide no specific instruction or guidance to make particular selections of specific components, or amounts thereof from the wide range of possibilities, and no understanding of which components, or amounts thereof that would be sufficient to reduce pesticide-induced phytotoxicity. As such, Beaty and Bath teach an almost infinite number of possible combinations of ingredients, with no specific guidance of which combinations would be successful.

As such, the cited references give no indication of which parameters are critical, no direction regarding the phytotoxicity of pesticide compositions or specific components and amounts thereof sufficient to reduce such phytotoxicity. Furthermore, the cited references give a wide range of possible pesticides, and fertilizer ingredients, plus a nearly unlimited number of possible combinations of components, and amounts thereof.

The Applicant submits that, based on the cited art, an impermissible ‘obvious to try’ standard has been applied by the Examiner in an attempt to argue the obviousness of the claimed invention. The courts have set forth how ‘obvious to try’ is erroneously equated with obviousness under U.S.C. § 103.^{3 4 5 6}

Not only do the cited references provide no guidance with respect to selecting components of phytotoxicity reducing pesticide compositions, the wide range of possible pesticides, fertilizers, and components of fertilizers given in the references, makes for an almost unlimited number of possible combinations. As such, Applicant submits that the cited art does not lead one of ordinary skill in the art to a finite number of identified, predictable combinations of components and amounts thereof, to arrive at the five specific claimed elements of the claimed composition in amounts sufficient to reduce pesticide-induced phytotoxicity.

Applicant respectfully submits that it would not be obvious to select the five specific claimed elements in amounts sufficient to reduce pesticide-induced phytotoxicity, based on the teachings of the cited references. The Examiner’s mere statement that “it would have been obvious to vary the form of each ingredient to optimize the effect desired” is insufficient to support a *prima facie* case of obviousness.

Harmon and Klopping both make no mention of phytotoxic pesticides, only make general mention of fertilizers, and fail to provide any specific teachings, instruction or guidance with respect to the selection of components, or amounts thereof from a wide range of possibilities. Beaty and Bath make no indication of which fertilizer components, and amounts thereof are

³ “When there is a design need or market pressure to solve a problem and there are a finite number of identifiable, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp.” *KSR Id.* at 402.

⁴ See, e.g., *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc.*, 520 F.3d 1358 (Fed. Cir. 2008); *Eisai Co. v. Dr. Reddy’s Laboratories*, 533 F.3d 1353 (Fed. Cir. 2008); *Pfizer, Inc. v. Apotex, Inc.* 488 F.3d 1377 (Fed. Cir. 2007); *Takeda Chemical Industries Ltd. v. Alphapharm Pty. Ltd.*, 492 F.3d 1350 (Fed. Cir. 2007).

⁵ *In re Kubin*, 561 F.3d 1351, 1359 (Fed. Cir. 2009). The Federal Circuit explained in *In re Kubin* that “the Supreme Court’s admonition against a formalistic approach to obviousness in *KSR* actually resurrects this court’s own wisdom in *In re O’Farrell*. This court in *O’Farrell* cautioned that ‘obvious to try’ is an incantation whose meaning is often misunderstood.”

⁶ One of O’Farrell’s impermissible “obvious to try” situations occurs where “what would have been ‘obvious to try’ would have been to vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result, where the prior art gave either no indication of which

critical and no direction as to which of many possible choices is likely to be successful.

Since the cited references provide no indication of which parameters are critical and no direction as to which of many possible combinations of elements is likely to be successful, it would not be obvious to one of ordinary skill in the art to select the five specific claimed elements (a) and (b)(i)-(b)(iv), in amounts sufficient to reduce pesticide-induced phytotoxicity.

Thus, the **impermissible** type of "obvious to try" suggestion of Harmon and Klopping in view of Beaty, as explained by Bath, does not render the invention claimed in the present application obvious. As such, a *prima facie* case of obviousness has not been established.

In view of the above, the Applicant submit that the rejected claims are not rendered obvious by the cited combination of references because: 1) the cited references do not teach or suggest the claimed element of amounts of components sufficient to reduce pesticide-induced phytotoxicity of a plant; 2) the showing of unexpected results in the Applicant's Experimental Section is sufficient to overcome a *prima facie* case of obviousness; and 3) the Examiner has not established a *prima facie* case because the Examiner has used an impermissible 'obvious to try' standard in attempting to argue the obviousness of the claimed invention.

Accordingly, the Examiner is respectfully requested to withdraw this rejection of Claims 1, 3-5, 7, 8, 10, 11, 13, 14, 16-20, 41, 42, 44, 45, 54 and 57.

Claim Rejection under 35 U.S.C. § 103, Harmon or Klopping in view of Bath

Claims 1, 3-5, 7, 8, 10, 11, 13, 14, 16-20, 38 and 39 are rejected under 35 U.S.C. §103 (a) as allegedly being unpatentable over Harmon (U.S. Patent No. 3,558,787) or Klopping (U.S. Patent No. 3,789,122) in view of Bath (U.S. Patent No. 6,083,293). Without any intention to acquiesce to the correctness of this rejection and solely to expedite prosecution, Claims 1, 11 and 14 are amended and Claims 38 and 39 were previously cancelled. To the extent that this rejection applies to amended claims and new Claims 61-63, it is respectfully traversed.

parameters were critical or no direction as to which of many possible choices is likely to be successful." *Id.* at 1359 (citing *In re O'Farrell*, 853 F.2d 894, 903 (Fed. Cir. 1988)).

The arguments presented in the rejection above with respect to the cited references Harmon, Klopping and Bath may also be applied to this rejection.

As reviewed above, Applicant contends that the combined teachings of Harmon and Klopping in view of Bath do not teach or suggest the claim element of a phytotoxicity-inducing amount of a phytotoxicity-inducing synthetic pesticide, or amounts of components (i)-(iv) sufficient to reduce pesticide-induced phytotoxicity of a plant. As such, the cited references do not teach or suggest each and every element of the claims.

In addition, Applicant contends that the Examiner's unsupported assertions and faulty reasoning are insufficient to rebut Applicant's objective evidence that the claimed compositions are more than merely the predictable use of prior art elements according to their established functions.

Furthermore, Applicant contends that a *prima facie* case of obviousness has not been established because an impermissible 'obvious to try' standard has been applied by the Examiner in an attempt to argue the obviousness of the claimed invention.

As such, a *prima facie* case of obviousness has not been established, for the reasons set forth above. Accordingly, the Examiner is respectfully requested to withdraw this rejection of Claims 1, 3-8, 10, 11, 13, 14 and 16-20 under U.S.C. § 103, over Harmon or Klopping in view of Bath.

CONCLUSION

The Applicant submits that all of the claims are in condition for allowance, which action is requested. If the Examiner finds that a telephone conference would expedite the prosecution of this application, please telephone the undersigned at the number provided.

The Commissioner is hereby authorized to charge any underpayment of fees associated with this communication, including any necessary fees for extensions of time, or credit any overpayment to Deposit Account No. 50-0815, order number YAMA-009.

Respectfully submitted,
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